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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

No. [redacted] 76

KLOR'S, INC.,

Petitioner,

vs.

BROADWAY-HALE STORES, INC., ADMIRAL CORPORATION, ADMIRAL DISTRIBUTERS, INC., ZENITH RADIO CORPORATION, WHIRLPOOL SEEGER CORPORATION, H. R. BASFORD COMPANY, RADIO CORPORATION OF AMERICA, LEO J. MEYBERG COMPANY, EMERSON RADIO AND PHONOGRAPH CORPORATION, JEFFERSON-TRAVIS, INC., PHILCO CORPORATION, PHILCO DISTRIBUTORS, INC., RHEEM MANUFACTURING COMPANY, GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC DISTRIBUTING CORPORATION, OLYMPIC RADIO AND TELEVISION, INC., OLYMPIC TELEVISION OF NORTHERN CALIFORNIA, TAPPAN STOVE COMPANY, O'KEEFE & MERRITT COMPANY,

Respondents.

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Statutes Involved	2
Question Presented	3
Preliminary Statement	3
Statement of the Case	4
Argument	10
Conclusion	20

STATUTES AND RULES

	Pages
Clayton Act, § 4; Act of Oct. 15, 1914, c. 323, § 4, 38 Stat. 731	2
Federal Rules of Civil Procedure Rule 42(b)	4
Robinson-Patman Act	4, 16
Sherman Act: Act of July 2, 1890, c. 647, 26 Stat. 209, as amended July 7, 1955, c. 281, 69 Stat. 282	
§ 1	2, 10
§ 2	2
28 U.S.C. § 1254(1)	2

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OPINION BELOW

The opinion of the Court of Appeals has not yet appeared in the Federal Reporter but is reported at 1958 Trade Cases, Para. 69,007, and is quoted in an appendix to the petition.

JURISDICTION

The judgment of the Court of Appeals was entered on March 28, 1958.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Sherman Act, §§ 1 and 2; Act of July 2, 1890, c. 647, §§ 1 and 2, 26 Stat. 209, as amended July 7, 1955, c. 281, 69 Stat. 282.

Sec. 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *"

Sec. 2:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *."

Clayton Act, § 4; Act of October 15, 1914, c. 323, § 4, 38 Stat. 731:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

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1. Erroneously stated as May 28 in the petition (p. 2).

QUESTION PRESENTED

The petition (p. 2) erroneously states that the question presented is whether a single trader injured by conduct forbidden by the Sherman Act may recover. Of course, the answer to such a question has always been yes. The actual question is whether the conduct complained of *was forbidden*, i.e., whether the alleged conspiracy was one in "restraint of trade" within the meaning of the Sherman Act or merely a private controversy for resolution in state courts under state law. Specifically, the question is this:

Where respondent retailer conditioned its purchase of certain brands of household appliances on willingness of respondent suppliers not to sell those brands to petitioner, a retailer next door who is but one of over 40 in the neighborhood and of hundreds if not thousands in the city, is an alleged conspiracy to refrain from selling those brands to petitioner, not aimed at a class of persons but at him alone, not aimed at any other retailer, not intended to have and not in fact having any effect on prices, on the availability of any product to the public or on the quality thereof, or on the availability to petitioner of innumerable competing brands, without any monopoly involved or possibility thereof, with no injury whatever to the public intended or effected, a violation of the Sherman Act?

PRELIMINARY STATEMENT

The petition involves no novel question. The kind of case it presents has been decided frequently, and without exception it has been held that no claim exists under the Sherman Act. The decision is not in conflict with that of any other court of appeals and applies principles repeatedly announced by this Court. It accords with the recent observa-

tion in *Northern Pacific Railway Co. v. United States* (1958), 356 U.S. 1, 7, that

> "if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

STATEMENT OF THE CASE

Petitioner is one of over 40 household appliance stores located within 11 blocks on Mission Street in San Francisco (R. 5; Def. Ex. A, R. 146) and one of "literally hundreds of dealers in the San Francisco Bay Area" (Pet. App. 30,[2] R. 25-43). Respondent Broadway-Hale Stores, Inc. (hereafter called Hale) is another retailer, with a store a few doors away (R. 5). The other 18 respondents are 10 manufacturers and 8 distributors of 10 brands of appliances.

Petitioner sued under the Robinson-Patman Act and section 4 of the Clayton Act by a complaint containing 41 counts, charging conspiracy and discrimination in prices and services.

As a result of a pre-trial conference it was stipulated and ordered that regardless of its allegations Count One should be deemed amended to seek relief solely under the Sherman Act, and the Robinson-Patman claims were relegated to the other 40 counts (R. 20; 142-144; Pet. App. 6). A series of orders then ensued under Rule 42(b) of the Federal Rules of Civil Procedure "by virtue of which Count One of the complaint and the claim for relief tendered thereby are to be treated in all respects as if they constituted a separate action" (R. 135). What followed concerned Count One alone, leaving petitioner with its other 40 counts still pending in

2. "Pet. App." refers to the opinion of the court of appeals appearing in the appendix to the petition.

the District Court upon which it was free to urge its claims of discrimination.

Count One thus became a simple charge that Hale declined to buy from respondent suppliers if they also sold to petitioner (a "next-door" competitor) and that as a result those suppliers "conspired" not to sell their brands to petitioner. It did not charge that the alleged conspiracy was aimed at market competition or at a class of persons but at petitioner alone, nor did it charge that the alleged conspiracy was either intended to or did have any effect on prices, retail or wholesale, on the availability of any product to the public or on the quality thereof, or on the availability to petitioner himself of innumerable competing brands.

Respondents first moved to dismiss Count One for failure to state a claim for relief. But in view of decisions that on a motion to dismiss the allegations of the complaint are to be liberally construed, whereas, if the case lacks merit, "an expensive full dress trial can be avoided by invoking the summary judgment procedure under Rule 56,"[3] respondents asked that ruling be deferred. They then filed motions for summary judgment (R. 22, 128, 130, 132), supported by affidavits (R. 25-125). Petitioner offered no affidavit in opposition. Respondents' purpose in proceeding on a motion for a summary judgment rather than on the motion to dismiss was to permit the issue to be decided on undisputed fact rather than on inference or construction of the mere language of the pleader.[4]

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3. *United States v. Employing Plasterers Ass'n.* (1954), 347 U. S. 186, 189.

4. As the court below said (Pet. App. 7):

"It should be noted here that the court below did not rule on the pleadings nor grant the motion to dismiss by reason of any failure therein. While a motion to dismiss was made, it was apparently passed over so that the motion for summary judgment could be determined. That latter motion having been granted, it was necessarily dispositive of the motion to dismiss."

As the District Court observed, the motion presented "an undisputed factual situation" (R. 145). It granted the motion for summary judgment (R. 133-136), and the Court of Appeals affirmed unanimously in an opinion by Judge Stanley N. Barnes.

The "undisputed factual situation" upon which the case was decided is summed up in the opinion below thus (Pet. App. 11-13):

> "Appellant [Petitioner] and appellee Hale are not the only retailers of appliances in San Francisco. There are literally hundreds, if not thousands, of others (R. 25-27). The classified section of the San Francisco Telephone Directory contains 14 pages of listings (R. 29-43). In San Francisco alone are sold not only the brands of appliances involved in this case but many other competing brands (R. 26-27). In addition to the 7 brands of television sets, radio and phonographs mentioned in the complaint, there are 20 other competing brands sold in San Francisco. In addition to the three mentioned brands of refrigerators there are 18 other competing brands. In addition to the 5 mentioned brands of stoves, there are 23 competing brands; in addition to the 2 mentioned brands of clothes washers and dryers, there are 30 competing brands. Among these competing brands are many of the outstanding and most widely advertised brands in the country, including the names Capehart, Crosley, Du Mont, Hallicrafter, Hoffman, Magnavox, Motorola, Packard-Bell, Scott, Westinghouse, Amana, Bendix, Coldspot, Frigidaire, Hotpoint, International Harvester, Kelvinator, Norge, Servel, Chambers, Roper, Thermador, Western Holly (see listing at R. 26-27). Appellant does not charge that he was denied the right to handle any of this vast number of brands manufactured and sold by companies not parties to this action.
>
> "Moreover, a large number of other retailers sell to the San Francisco public the very brands referred to

in the complaint. At the date of filing suit the number of dealers *in San Francisco* handling these products was as follows: (see note 24.)

"In the *Mission District alone*, in San Francisco, there are 53 dealers selling the brands referred to in the complaint. Restricting the area under consideration even more narrowly, *to Mission street alone*, a member of the public desiring to purchase an appliance and strolling down Mission Street for a span of but 11 blocks, of which appellant's store is approximately in the center, would pass the shops of 43 retailers, selling the specific items and brands referred to in the complaint. * * *

"* * * while the alleged conspiracy is charged as having begun prior to 1952 (R. 9), the number of retail stores in San Francisco selling the items and brands referred to in the complaint steadily increased after 1952 and up to the time of the commencement of the suit. Admiral dealers increased from 150 to 195, and in the Mission District alone from 20 to 36; Zenith from 120 to 153; Whirlpool dealers from 40 to 47; Emerson from 40 to 109 and in the Mission District alone from 13 to 29; Philco from 79 to 175 and in the Mission District alone from 22 to 47; Wedgewood Stove dealers from 41 to 56 and from 8 to 9 in the Mission District alone; General Electric dealers and RCA have run into the hundreds for years and there have been no material variations."

"24

Admiral products	195 retailers	(R. 45)
Zenith products	153 retailers	(R. 48)
Whirlpool products	67 retailers	(R. 50)
RCA products	127 retailers	(R. 52)
Emerson products	109 retailers	(R. 54)
Philco products	175 retailers	(R. 58)
Rheem products	56 retailers	(R. 62)
GE products	110 retailers	(R. 66)
Olympic products	33 retailers	(R. 116)
Tappan products	13 retailers	(R. 118)
O'Keefe & Merritt products	65 retailers.	(R. 121)"

[Italics are in the original.]

In short, the essence of the charge as amplified and clarified by the undisputed showing is this. Petitioner is a retailer of certain commodities of which (a) a tremendous number of brands are in open competition with each other, and (b) innumerable retailers are openly competing with each other on the very brands mentioned in the complaint. Numerous competing brands not involved in the alleged conspiracy are available to petitioner,[5] and the brands involved are being sold by innumerable others. Both the commodities and the particular brands are as available to the public as they ever were; there are still "literally hundreds, if not thousands" of retail outlets to the public (Pet. App. 11). Further as the court below pointed out (Pet. App. 23):

> "There was no charge or proof that by any act of defendants the price, quantity, or quality offered the public was affected, nor that there was any intent or purpose to effect a change in, or an influence on, prices, quantity, or quality, either directly or indirectly."

The alleged conspiracy was not aimed at market competition, at any class of people, but at a single "next-door" retailer. It had no tendency to monopoly. Again, as the court said (Pet. App. 30):

> "There is no allegation of actual, attempted, or intended control of the market in which plaintiff and defendant Broadway-Hale competed, considering the market to be either the retail sellers of the Mission District of San Francisco, the city itself, or the purchasing public. Defendants' affidavits, submitted under the provisions of Rule 56 of the Federal Rules, as well as the facts of which this Court may take judicial notice leave no doubt that the conduct directed at this particular plaintiff and only at this plaintiff did not and could not have under

5. Although the petition refers to "elimination" of a trader, there was no charge that petitioner was eliminated, only that he was denied particular brands.

> the circumstances any substantial effect on market competition. * * * there are literally hundreds of dealers in the San Francisco Bay Area dealing in the same kinds and brands of major appliances as plaintiff and defendant Broadway-Hale."

While the complaint referred to monopoly and monopolization and the petition is replete with similar references (e.g., pp. 4, 5, 6, 9, 24), one of the purposes and accomplishments of the motion for summary judgment was to demonstrate that these were sham allegations. In view of the undisputed facts, not to speak of the judicial notice of the two courts concerning the very community in which those courts sit,[6] both courts below recognized without hesitation that no genuine issue on this subject was involved.

In conclusion the court of appeals observed (Pet. App. 32) that the record showed

> "no more than a squabble between two of many competitors in a highly competitive market area. * * * Construing the complaint and affidavits together, and considering the facts judicially known to this Court and the court below, the motion for summary judgment was properly granted."

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6. Among the innumerable other retailers handling the very brands referred to in the complaint are large nationwide concerns like Butler Bros., R. 67, 72, 84; Macy's, R. 45, 48, 51, 55, 59, 65, 76, 95, 122; Electrolux Corp., R. 88; S. H. Kress Co., R. 94, 113; McKesson-Robbins, R. 96; Walgreen's, R. 108; J. C. Penney Co., R. 49, 100, not to speak of retailers the local courts know to be some of the largest in the community, like City of Paris, R. 48, 55, 59, 73, 85; The Emporium, R. 48, 51, 65, 74, 88, 119, 122; Dohrmann's, R. 49, 65, 67, 73, 87, 119, 122; Schwabacher, Frey, R. 49, 51, 59, 77, 103; The White House, R. 55, 59, 108; I. Magnin's, R. 55; Gump's, R. 91; Sherman Clay & Co., R. 48, 77, 80, 104, 114; Kahn & Keville, R. 68, 75, 93; Lachman Bros., R. 49, 51, 56, 64, 69, 71, 75, 79, 94, 113, 122, 123; Redlick's, R. 64, 69, 71, 76, 80, 101, 113, 122, 123; Scott Plumbing Co., R. 69; Sterling Furniture Co., R. 48, 51, 65, 70, 77, 80, 105, 122; Charles Brown & Sons, R. 45, 49, 59, 72, 84; Union Furniture Store, R. 107, 115, 123; W. & J. Sloane Co., R. 48, 104, and L. R. Jackson Home Wares Co., R. 59, 93, none of which were parties to this litigation or charged with participation.

ARGUMENT

Repeatedly petitioner refers to the decision of the court below as if it holds that a single trader has no remedy under the Sherman Act (e.g., Pet. 7, 31, 36). To the direct contrary, the court carefully announced the settled rule that a single trader—any "private plaintiff" (Pet. App. 25)—has a cause of action under the Sherman Act *if* he is injured by conduct proscribed by that Act.

Basically, the question is whether the case stated in the opinion of the court of appeals involved a "restraint of trade or commerce". Section 1 of the Sherman Act does not prohibit all "conspiracies" but only such as are "in restraint of trade or commerce". As this Court said in *Chicago Board of Trade v. United States* (1917), 246 U.S. 231, 238, and recently repeated in *Northern Pacific Railway Co. v. United States* (1958), 356 U.S. 1, 5, it is elementary that the key phrase—"restraint of trade"—is not to be given a drily literal meaning. At an early date, in *Wilder Mfg. Co. v. Corn Products Co.* (1915), 236 U.S. 165, the Court stated that

> "the prohibitions of the statute were enacted to prevent not the mere injury to an individual • • • but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence • • • prohibitions of the statute • • • were co-extensive with such conceptions" (p. 174).

Accordingly, one of the expressions which emerged is that to constitute a violation of the Sherman Act there must be a "public injury" and that the Act cannot be invoked in aid of a merely private controversy—a shorthand way of saying that not all conspiracies violate that Act because not all restrictions on trade fall within its purview.

Apex Hosiery Co. v. Leader (1940), 310 U.S. 469, gave the definitive expression of the kind of restriction on trade

with which the Act is concerned. Rejecting the contention that "the Sherman Act is violated when it is shown that a combination or conspiracy existed which resulted in a restraint of commerce" (pp. 473, 484),[7] it held that the term "restraint of trade" was to be interpreted "in the light of its legislative history and of the particular evils at which the legislation was aimed" (p. 489), that "the mere fact of * * * restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act" (p. 503); that

> "* * * The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, *all of which had come to be regarded as a special form of public injury*" (p 493),[8]

and that the Court had never "departed from the conception of the Sherman Act as affording a remedy, public and private, for the public wrongs which flow from restraints of trade" in this common-law sense (p. 500).[9]

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7. Even when the defendants "intended to restrain commerce" and such was the direct consequence (pp. 475, 485).

8. The emphasis is as supplied in the quotation of this passage in *Radovich v. National Football League* (1957), 352 U. S. 445, 453, footnote 10. Unless otherwise indicated emphasis throughout this brief is ours.

9. The petition would dismiss *Apex* as a "labor" case (pp. 27, 28). But the Court took pains in that case to make clear that it was not decided on any ground peculiar to labor or labor organizations. It said (p. 512):

> "Apart from the Clayton Act it [the Sherman Act] makes no distinction between labor and non-labor cases. We * * * hold * * * both in labor and non-labor cases, that such restraints are not within the Sherman Act unless they are intended to have, or in fact have, the effects on the market * * * Unless the principle of these cases is now to be discarded, an impartial application of the Sherman Act to the activities of industry and labor alike would seem to require that the Act be held inapplicable * * *."

In *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* (1948), 334 U.S. 219, this Court stated the test of a private party's right to recover under the Act to be "whether the statute's policy has been violated in a manner to produce the *general consequences it forbids for the public* and the special consequences for particular individuals". (p. 243)

If a restriction does not meet these tests, it is not a "restraint of trade", and one seeking damages must find other bodies of law over which a federal court has no cognizance in the absence of diversity jurisdiction. The Sherman Act was not designed to bring under federal cognizance all alleged commercial torts, or make every quarrel justiciable in the federal courts as an antitrust case merely by the talismanic charge of conspiracy.[10]

The rule applied by the courts below has been settled law since the Standard Oil case in 1911 held that the Sherman Act applies only to "acts which were unreasonably restrictive of competitive conditions", *Standard Oil Co. v. United States* (1911) 221 U.S. 1, 58. The decision that petitioner's case fails to meet these settled tests of the Act is in accord with the decision of every court before which similar complaints have come. It has been held, repeatedly, that the Sherman Act is not concerned with whether a particular retailer, sales agent or consignee handles or sells a particular commodity, so long as there are many others selling it, there being no effect, and no purpose to work an effect, on prices, quality or quantity available to the public and no monopoly. Public injury in this sense is essential. See, for

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10. As cogently said in *District of Columbia Cit. Pub. Co. v. Merchants and Manufacturers Assn.* (D.D.C. 1949), 83 F. Supp. 994, 997:

> "• • • although there may exist an actionable wrong, the individual's right to redress cannot be asserted by virtue of the Sherman Act."

example, *Shotkin v. General Electric Co.* (10 Cir., 1948), 171 F.2d 236; *Feddersen Motors v. Ward* (10 Cir. 1950), 180 F.2d 519;[11] *Hudson Sales Corp. v. Waldrip* (5 Cir. 1954), 211 F.2d 268, cer. den. (1954) 348 U.S. 821; *Westmoreland Asbestos Co. v. Johns-Manville Corp.* (2 Cir. 1943), 136 F.2d 844; *Ruddy Brook Clothes v. British & Foreign Marine Ins. Co.* (7 Cir. 1952), 195 F.2d 86, cer. den. (1953) 344 U.S. 816; *Kinnear-Weed Corp. v. Humble Oil and Refining Co.* (5 Cir. 1954), 214 F.2d 891, cer. den. (1955), 348 U.S. 912; *Interborough News Co. v. Curtis Publishing Co.* (2 Cir. 1955), 225 F.2d 289, affirming 127 F. Supp. 286 (S.D. N.Y. 1954); *Miller Motors, Inc. v. Ford Motor Co.* (4 Cir. Jan. 1958), 252 F.2d 441.

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11. The petition (at p. 30) cites *New Home Appliance Center v. Thompson*, 250 F.2d 881 as a later decision of the Tenth Circuit claimed to be a rejection of the *Shotkin* and *Feddersen* cases. This is plainly not so. The *New Home Appliance* case was decided purely as a question of pleading, not on a motion for summary judgment, the court noting (p. 883) that "the free use of summary judgment is available to avoid expensive trials of frivolous claims". The issue was simply the sufficiency of the complaint which alleged a conspiracy aimed not at the plaintiff alone but of a

> "purpose, object and effect * * * to deny retail appliance *dealers* in Denver, Colorado free access to the channels of interstate commerce by preventing them from making interstate purchases; and requiring them to purchase their requirements of home appliances from local wholesalers in Colorado, and thus *to fix the prices* at which such products were to be sold retail by Denver retail dealers; *to monopolize* interstate commerce in wholesale appliances and to eliminate the complainant as a competitor in such trade." (p. 882).

That is, it charged a conspiracy aimed at the whole class of retail dealers, to fix prices, and to monopolize, whereby

> "It was specifically alleged that by such concerted action, the defendants had restrained and monopolized a substantial part of interstate commerce by eliminating the plaintiff's competition and raising prices for home appliances to consumers in Denver and vicinity." (p. 883).

Precisely these elements were wholly lacking in the present case.

District Court decisions to the same effect are numerous.[12]

Petitioner does not contend (Pet. 9-16) that its case meets these settled tests but contends that they have been swept aside by *Radovich v. National Football League* (1957), 352 U.S. 445 (e.g., pp. 9-16). This contention was fully answered by the court below. *Radovich* "was a pleading case" (Pet. App. 17), for the complaint had been dismissed on a motion directed to the pleading alone, in contrast with the present case where judgment was entered upon motion for summary judgment in which undisputed facts were adduced to control and clarify the pleading. As this Court noted (352 U.S. 445, 448):

> "Since the complaint [in Radovich] was dismissed its allegations must be taken by us as true. It is, therefore, important for us to consider what Radovich alleged."

What *Radovich* alleged was not a conspiracy aimed at the plaintiff alone but a conspiracy to monopolize a whole industry, to boycott a whole football conference and all its players, so as to destroy the competition of the entire conference and thereby to produce a monopoly of all professional football in a single conference. Radovich's injury was

> "* * * the result of a conspiracy among the respondents to monopolize commerce in professional football

12. E.g., *Neumann v. Bastian-Blessing Co.*, 70 F. Supp. 447 (N.D. Ill. 1947); *Riedley v. Hudson Motor Car Co.*, 82 F. Supp. 8 (W.D. Ky. 1949); *Northern California Monument Dealers v. Interment Assn.*, 120 F. Supp. 93, 95 (N.D. Cal. 1954); *Abouaf v. J. D. & A. B. Spreckels Co.*, 26 F. Supp. 830 (N.D. Cal. 1939); *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D. Md. 1938); *District of Columbia Cit. Pub. Co. v. Merchants and Manufacturers Association*, 82 F. Supp. 994 (D.D.C. 1949); *Swartz v. Forward Ass'n.*, 41 F. Supp. 294 (D. Mass. 1941); *Admiral Theatre Corp. v. Paramount Film Distributing Corp.*, 140 F. Supp. 686 (D. Neb. 1955); *Radiant Burners, Inc. v. American Gas Association, Inc., et al.* (N.D. Ill. Dec. 1957); 1957 Trade Cases, Para. 68,909.

among the States. The purpose of the conspiracy was to 'control, regulate and dictate the terms upon which organized professional football shall be played throughout the United States' * * *. It was part of the conspiracy to boycott the All-America Conference and its players with a view to its destruction and thus strengthen the monopolistic position of the National Football League" (pp. 448, 449).

The petition's next most frequent citation is *Binderup v. Pathe Exchange* (1923), 263 U.S. 291 (e.g., Pet. p. 16, et seq.). That was a case of monopoly and, in addition, of a conspiracy having price-fixing as its object and directed at a class. The defendants there were film distributors and controlled *all* the films in the United States, and their Film Board of Trade aimed at the control of *prices* and terms of *all* exhibitors. Plaintiff, an operator of a chain of motion picture theatres in Nebraska (p. 301), was injured as one of the class of exhibitors. The complaint alleged (263 U.S. at 302, 303):

"* * * that these distributors control the distribution of *all* films in the United States and that *the films cannot be procured from others.* * * * It is alleged that * * * the Omaha Film Board of Trade was organized for the purpose of enabling these distributors *to control prices and dictate terms to their patrons* in Nebraska and other States."

Petitioner's view of the *Binderup* decision was advanced and rejected as incorrect in *Interborough News Co. v. Curtis Publishing Co.*, 127 F. Supp. 286 (S.D. N.Y.) where a directed verdict was granted and affirmed, 225 F.2d 289 (2 Cir. 1955).

In discussing the *Binderup* case, and elsewhere throughout its argument, petitioner seeks refuge in labels, ignoring

substance.[13] Thus it labels this case as one of "boycott".[14] A collective refusal to deal with a whole class of persons may well always be illegal as involving public injury. In contrast, a refusal to deal with a single person may or may not be. In a particular case it may have the purpose or effect of fixing prices, limiting quantity, achieving a monopoly, or the like. If so, it would fall within the prohibitions of the Sherman Act; otherwise not, for what makes the illegality is "either what was sought to be accomplished by the concerted refusals to deal or what was the necessary result thereof," not the label "boycott". *Interborough News Co. v. Curtis Publishing Co.* (S.D. N.Y. 1954), 127 F. Supp. 286, 300, 301, affirmed 225 F.2d 289 (2 Cir. 1955).

Another example of petitioner's reliance on labels is its repeated reference to alleged discrimination "in prices, advertising allowances, demonstration techniques and other terms and conditions" of sale (e.g., Pet. 3, 4, 5, 10, 19, 23, 24, 25, 26). The issues of discrimination under the Robinson-Patman Act are not here involved (see pp. 4 and 5, supra),

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13. The opinion of the court below comments on "the many phrases * * * picked at random out of numerous cases * * * out of context" (Pet. App. 24) and further notes (Pet. App. 28):

> "Plaintiff cites us many cases involving group boycotts * * *. But each of his authorities involves factual situations entirely different from the one before us; factual situations in which the random phrases picked by plaintiff are proper and not inaccurate; they do not, however, support the contentions made here."

14. The word "boycott" is a word of many meanings, ranging from one person's refusal to deal with another to a group refusal to deal with a person as a means of coercing him from dealing with a third person. Cf. *United States v. Waltham Watch Co.*, 47 F. Supp. 524 (S.D. N.Y. 1942) and *Flintkote Company v. Lysfjord* (9 Cir. 1957) 246 F.2d 368, cer. den. 355 U. S. 835. The latter meaning was said by Judge (later Chief Justice) Taft to be the only meaning. *Toledo, A.A. & N.M. Ry. Co. v. Penn. Co.*, 54 Fed. 730, 738 (C.C. N.D. Ohio, 1893). A boycott may be legal or illegal under non-federal and common law principles of tort law depending on the facts and not the label.

and the test of illegality under the Sherman Act remains unchanged by labeling an alleged conspiracy to decline to sell to a person a "conspiracy to discriminate" against him.[15] Thus in *Feddersen Motors v. Ward* (10 Cir. 1950), 180 F.2d 519, the complaint alleged a conspiracy to discriminate against plaintiff but was held insufficient.

The many cases cited by petitioner, including the *Binderup* case, are all carefully analyzed and distinguished by the court below (Pet. App. 29-30) as cases where

> "* * * defendants' conduct either did or was intended to eliminate the sole competitor in a particular market, was directed at one of a very small number of competitors,[47] or involved the use of large scale monopolistic power derived from nationwide enterprises to eliminate a competitor and thereby substantially affect competition in the local market area. * * *"

"47. Removal of any one competitor thereby having a substantial effect on competition."

or as cases

> "* * * in which price fixing or some other form of complete market control was involved and where defendants' conduct was directed at a particular class of persons of which plaintiff was one. * * * the conduct involved either was intended to control the entire market and was directed at plaintiff because he refused to conform or was directed at an entire class of defend-

15. The petition cites (p. 19) *Moore v. Mead's Fine Bread Co.* (1954), 348 U.S. 115 and *Bigelow v. R.K.O. Radio Pictures* (1946) 327 U.S. 251. The *Moore* case involved the Robinson-Patman Act, not the Sherman Act at all. The *Bigelow* case did not involve a discrimination merely against plaintiff but "a discriminatory *system* of distributing motion pictures" (p. 255) which gave preference to the theaters owned, leased or operated by defendants themselves over all independents as a class (p. 256) and which was carried on "*as part* of a conspiracy to maintain minimum admission prices to be charged by exhibitors generally", and "the object of this conspiracy was to make it possible to maintain high admission prices (p. 257)"

ants' competitors, buyers, or sellers, one of whom was the plaintiff. * * * Not one of the out of context quotations from the foregoing cases used by plaintiff will support his position when read within its factual setting."

In the cases brought by a private plaintiff where the Sherman Act has been held violated, the conspiracy was either aimed at or struck a broader purpose or target than the particular plaintiff—for example, its objective was price fixing, limiting quantity to the public, degrading quality, or achieving a monopoly—and the particular plaintiff was injured because he stood in the way of those objects or otherwise as an incident to the accomplishment of that purpose.

Finally, in an attempt to inject into the case elements of monopolization, the petition asserts (p. 25) that "'This group [respondent suppliers], it is not denied, have selected Broadway-Hale to dictate market allocations. They have, it is not denied, refused to do business with the competitors of Broadway-Hale if it so requests", and it speculates about respondents' future intentions. These are erroneous statements. The sole charge was that respondents refused to sell to petitioner, with nothing whatever about other competitors or future plans or intentions. The court below expressed no views about the legal questions that would arise in a case where one retailer "dictate[s] market allocations" or where suppliers "refuse to do business with the competitors" of one retailer "if it so requests".

One further comment may be made. In order to avoid arguments about pleading, our motion for summary judgment approached the case on the basis on which the petitioner now treats it, i.e., on the assumption that it charged respondent suppliers with conspiring with Hale's not to sell

petitioner. And the court of appeals treated it on the same assumption (Pet. App. 23). But we cannot refrain from noting what a fantastic charge that is, for it taxes credulity to suppose that a manufacturer of radios and televisions like Zenith conspired with a manufacturer of gas stoves like Rheem and a manufacturer of clothes washers and dryers like Whirlpool-Seeger not to sell to petitioner. Elsewhere petitioner has put a less implausible face on its complaint, stating that Hale told each supplier respondent that it would not buy from it if it chose to sell to petitioner, and the supplier, thus having its choice of Hale's custom or petitioner's, preferred Hale's. Thus the petition (p. 24) quotes the complaint as alleging "that Broadway-Hale 'has purchased and continued to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff.'" Such a charge would not be one of conspiracy at all, it being no conspiracy for a buyer to refuse to purchase goods from a seller who rejects a request to stop selling to a competitor, either under the Sherman Act[16] or the common law of California.[17]

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16. *United States v. Bausch & Lomb Co.* (1944), 321 U. S. 707, 729, approving *Federal Trade Commission v. Raymond Co.* (1924), 263 U. S. 565, 573, which in turn cited *Grenada Lumber Co. v. Mississippi* (1910), 217 U. S. 433, 440; also *Mackey v. Sears, Roebuck & Co.* (7 Cir., 1956), 237 F.2d 869, 872, cer. den. (1957), 355 U. S. 865.

17. *Rolley, Inc. v. Merle Norman Cosmetics* (1954), 129 C.A. 2d 844, 278 Pac. 2d 63.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated, San Francisco, California, June 25, 1958.

Respectfully submitted,

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